RECORD AND BRIEFS

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In the

# Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
*Petitioner*,

v.

SARA PARKER PAULEY, IN HER OFFICIAL CAPACITY,
*Respondent*.

*On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit*

## BRIEF FOR PETITIONER

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## QUESTION PRESENTED

Whether the exclusion of churches from an otherwise neutral and secular aid program violates the Free Exercise and Equal Protection Clauses when the state has no valid Establishment Clause concern.

## PARTIES TO THE PROCEEDING

Petitioner is Trinity Lutheran Church, Inc.

Respondent is Sara Parker Pauley, in her official capacity as Director of the Missouri Department of Natural Resources.

## CORPORATE DISCLOSURE STATEMENT

Petitioner Trinity Lutheran Church is a non-profit corporation, exempt from taxation under 26 U.S.C. § 501(c)(3). It does not have parent companies and is not publicly held.

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## INTRODUCTION

Missouri's Scrap Tire Grant Program provides reimbursement for rubber safety flooring for all playgrounds that meet certain neutral criteria—except for playgrounds owned by churches and religious organizations. Trinity Lutheran Church was denied participation in this recycling and child safety program solely because of who it is—a church—even though the Missouri Department of Natural Resources ("DNR") ranked its application fifth out of forty-four submitted. In the name of the Missouri state constitution's antiestablishment principle, the DNR violates the United States Constitution's free exercise and equal protection guarantees. And it does so even though including religious entities in the program would equally further the state's goals of keeping tires out of Missouri's' landfills and fostering children's safety. A rubber playground surface accomplishes the state's purposes whether it cushions the fall of the pious or the profane.

The DNR's categorical exclusion of religion in this case is unvarnished status-based discrimination that violates the Free Exercise and Equal Protection Clauses. A categorical ban on religion here is merely an overbroad and unconstitutional restriction on the faithful's ability to participate on equal terms in public life. This Court should protect the free exercise of religion in our Nation by rebuffing the DNR's gratuitous attempt to "impose special disabilities on the basis of religious status," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,

508 U.S. 520, 533 (1993) (quotation and alteration omitted).

## OPINIONS AND ORDERS BELOW

The Eighth Circuit's decision affirming the judgment for Respondent is reported at 788 F.3d 779 and reprinted in the Petition for Writ of Certiorari Appendix ("Pet. App.") at 1a-31a. The Eighth Circuit's order denying rehearing en banc is unreported but reprinted at Pet. App. 32a-33a.

The District Court's opinion granting Respondent's motion to dismiss is reported at 976 F. Supp. 2d 1137 and reprinted at Pet. App. 34a-75a. The District Court's opinion denying Petitioner's motion for reconsideration and for leave to file an amended complaint is unreported but reprinted in Pet. App. 76a-84a.

## STATEMENT OF JURISDICTION

The Eighth Circuit issued a 2-1 opinion on May 29, 2015, and, by an equally divided court, denied rehearing en banc on August 11, 2015. Trinity Lutheran filed its Petition in this Court on November 4, 2015, which was granted on January 15, 2016. The Court extended the time in which to file Petitioner's brief on the merits to and including April 14, 2016. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The text of the First and Fourteenth Amendments to the United States Constitution are set forth in the Joint Appendix at 1.

The text of Article I, § 7, of the Missouri Constitution is set forth at Pet. App. 85a.

Missouri Statute § 260.273, the statutory authorization for the Scrap Tire Grant Program under review, is set forth at Pet. App. 86a-88a.

Title 10 § 80-9.030 of the Missouri Code of State Regulations, the administrative regulation establishing the Scrap Tire Grant Program, is set forth at Pet. App. 89a-96a.

The list of criteria the Department of Natural Resources uses to evaluate and rank the scrap tire grant applications is set forth in an Addendum to this Brief at 1a-19a.

## STATEMENT OF THE CASE

### A. Statement of Facts

Trinity Lutheran Church operates a pre-school education and daycare center named The Learning Center. Pet. App. 99a. The Learning Center formerly operated as a separate entity but merged into the Church in 1985 and has operated as a Church ministry ever since. Pet. App. 99a.

Enrollment at The Learning Center averages ninety children ages two through five. Pet. App. 100a. The Learning Center is licensed by the State of Missouri. Pet. App. 131a.

The Learning Center has a playground for the children who attend. Pet. App. 102a. At any given play period, about thirty to forty children use the playground. Pet. App. 132a. Children from the surrounding community also use the playground after school hours and on weekends. Pet. App. 133a.

Children need a safe place to play. The existing playground surface of pea gravel and grass does not adequately protect the children from injury. Pet. App. 132a. The hard, jagged edges of the pea gravel are unforgiving and shift away from the play equipment thereby posing a safety risk to children. *Id.*

In 2012, the Church learned about the State of Missouri Scrap Tire Grant Program, which provides reimbursement grants for nonprofit organizations to purchase rubber pour-in-place playground surfaces made from recycled tires. Pet. App. 102a. The state funds the program through a fee imposed on the sale of new tires. *See* Mo. Stat. § 260.273(6)(2). Anyone, including religious organizations and their members, who buys a new tire pays this fee. *Id.* The state uses the program to reduce the number of used tires in landfills and illegal dump sites and to foster children's safety. Pet. App. 86a-88a. The DNR administers the Scrap Tire Grant Program. Pet. App. 89a.

Desiring to enhance the safety and accessibility of The Learning Center's facilities, Trinity Lutheran submitted an application for a scrap tire grant to resurface its playground. The application is detailed and requires, among other things, a description, a plan, a budget for the project, a media plan for advertising the benefits of recycling, and an education plan to teach students the benefits of recycling. Pet. App. 120a-126a.

The DNR ranks each application for the Scrap Tire Grant Program because it only awards a certain number of grants per year based on the amount of money it collects from the fee imposed on retail tire sales. Pet. App. 86a-87a, 103a. The DNR criteria for ranking applications are entirely secular and neutral. They include, among other things, whether the application describes the project in adequate detail, includes quotes from at least three scrap tire vendors, and has a detailed plan for installation. *See* DNR Publication 2425, *available at* http://dnr.mo.gov/pubs/pub2425.htm (last visited April 7, 2016), *reprinted in* Addendum to Brief at 1a-19a. A complete list of the criteria is contained in the Addendum at 9a-19a.

The DNR, though, publishes a "Notice to religious based organizations" in which it closes the door to any potential applicants who are religious. On its face, the Notice applies to all religious organizations and states:

> Due to a Missouri Supreme Court ruling, religious based organizations may be eligible

for a grant if:

> 1. The applicant is not owned or controlled by a church, sect or denomination of religions and the grant would not directly aid any church, sect or denomination of religion.
>
> 2. The applicant's mission and activities are secular (separate from religion; not spiritual) in nature.
>
> 3. The grant will be used for secular (separate from religion; not spiritual) purposes rather than for sectarian (denominational, devoted to a sect) purposes.

Addendum at 2a-3a.

Trinity Lutheran submitted an application in 2012. Pet. App. 120a-151a. The DNR received forty-four applications that year. Pet. App. 154a. Using its neutral scoring criteria, the DNR ranked the Church's application fifth out of the forty-four applications submitted. *Id.* The DNR awarded fourteen grants that year but denied Trinity a scrap tire grant solely because it is a church. *Id.*

The DNR notified the Church by letter, which explained:

> [A]fter further review of applicable constitutional limitations, the department is unable to provide this financial assistance directly to the church as contemplated by the grant application. Please note that Article I, Section 7 of the Missouri Constitution specifically provides that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion...."

Pet. App. 152a-153a.

### B. Procedural Background

Trinity Lutheran filed a complaint in the U.S. District Court for the Western District of Missouri on January 25, 2013, alleging that the DNR's policy of denying scrap tire grants to churches violated the Free Exercise, Equal Protection, Free Speech, and Establishment Clauses of the First and Fourteenth Amendments to the United States Constitution, as well as the Missouri Constitution, Article I, § 7. Pet. App. 97a-119a. Trinity Lutheran's complaint was an as-applied challenge, focusing on the DNR policy's application to the church. Trinity Lutheran did not bring a facial challenge to the Missouri Constitution, Article I, § 7.

The district court dismissed Trinity Lutheran's complaint as matter of law with prejudice. Pet. App. 34a-35a. It rejected the church's free exercise claim, reasoning that the Scrap Tire Grant Program involved a direct payment of funds to a sectarian

institution that raised "antiestablishment concerns that are at least as comparable to those relied on by the Court in *Locke* [*v. Davey*, 540 U.S. 712 (2004)]." Pet. App. 54a. This Court held in *Locke* that the State of Washington could deny a scholarship to a student undergoing religious training to be a member of the clergy without violating the Free Exercise Clause. *Id.* The district court cited *Locke* for the proposition that Trinity Lutheran's failure to state a violation of the Free Exercise Clause meant that its "Equal Protection claim must also be dismissed." Pet. App. 69a. The District Court also denied Trinity Lutheran's motion for leave to amend the complaint, ruling that, as a matter of law, any amendment would be futile. Pet. App. 83a.

Trinity Lutheran appealed to the Eighth Circuit, which issued a divided panel opinion affirming the district court's dismissal of the church's Complaint as a matter of law. Pet. App. 1a-31a. The panel opinion incorrectly characterized Trinity Lutheran's Complaint as a facial attack on Article I, § 7, of the Missouri Constitution, Pet. App. 6a, despite the fact that the Complaint brought an as-applied challenge and explicitly stated so several times, *see, e.g.* Pet. App. 106a, 111a, 112a (alleging "Defendant['s] ... unconstitutional application of" Article I, § 7); Pet. App. 109a, 110a (challenging "Defendant's actions in unconstitutionally enforcing [Article I, § 7] by denying Plaintiff's grant application"). The Complaint further requested limited relief that applied only to Trinity Lutheran. *See* Pet. App. 116a (requesting declaration that the DNR's denial of its grant application was unconstitutional); *id.*

(requesting injunctive relief only to prohibit the DNR from denying Trinity Lutheran's participation in the grant program); *id.* (requesting the court "[d]eclare that [Article I, § 7] was unconstitutional as applied to deny Plaintiff's 2012 grant application"). Judge Gruender, in dissent, noted the panel majority's error by pointing out that Trinity Lutheran did not bring a facial challenge to the Missouri Constitution. *See* Pet. App. 24a.

The Eighth Circuit panel majority held that the exclusion of religious organizations from the Scrap Tire Grant Program was justified under *Locke* because there was no "break in the link" between state funds and religion. Pet. App. 10a. The Eighth Circuit was concerned about "the direct grant of public funds to churches, another of the 'hallmarks of an 'established' religion,'" regardless of the secular use to which those funds are put. *Id.* Like the district court, the Eighth Circuit panel majority cited *Locke* for the proposition that "the absence of a valid [f]ree [e]xercise claim" required the dismissal of Trinity Lutheran's equal protection claim as well. Pet. App. 12a.

Judge Gruender dissented because he viewed this Court's reasoning in *Locke* as showing that "'Trinity Lutheran has sufficiently pled a violation of the Free Exercise Clause as well as a derivative claim under the Equal Protection Clause." Pet. App. 23a. Judge Gruender correctly noted that "*Locke* did not leave states with unfettered discretion to exclude the religious from generally available public benefits." Pet. App. 26a. And he explained that "[i]f

giving the Learning Center a playground-surfacing grant raises a *substantial* antiestablishment concern, the same can be said for virtually all government aid to the Learning Center, no matter how far removed from religion that aid may be." Pet. App. 29a.

Trinity Lutheran filed a motion for rehearing en banc that was denied by an equally divided court. Pet. App. 32a-33a. This Court granted review on January 15, 2016. On February 9, 2016, this Court extended the deadline to file the joint appendix and petitioner's brief on the merits until April 14, 2016.

## SUMMARY OF ARGUMENT

The DNR's categorical exclusion of religious daycares and preschools from the Scrap Tire Grant Program is discrimination based on religious status that violates the Free Exercise and Equal Protection Clauses. It is not neutral nor is it generally applicable for the state to impose special burdens on non-profit organizations with a religious identity and doing so cannot survive strict scrutiny. Moreover, the Missouri state constitution's antiestablishment concerns cannot trump the United States Constitution's guarantees of free exercise of religion and equal protection to all citizens. Excluding Trinity Lutheran from the Scrap Tire Program here exhibits an undeniable hostility to religion that offends the Constitution's essential mandate of religious neutrality.

The Eighth Circuit strayed by forcing this case

within the confines of *Locke v. Davey*. Trinity Lutheran sought to participate in a generally available public benefit program that provides recycled rubber flooring to protect children from cuts and bruises on the playground. *Locke* rejected a free exercise challenge to compel a state to fund the religious training of clergy. This case is as far from *Locke* as one can conceive.

## ARGUMENT

### I. The DNR's categorical exclusion of religious organizations from the Scrap Tire Grant Program violates the Free Exercise Clause.

The DNR's application of Missouri Constitution, Article I, § 7, to categorically exclude religious organizations from the Scrap Tire Grant Program based solely on their religious status violates the Free Exercise Clause. The DNR's policy exhibits hostility to religion by singling out and excluding religious institutions solely because of who they are. Thus, it is neither neutral nor generally applicable.

#### A. The DNR's categorical exclusion of religious organizations is religious status discrimination.

It is well-established that the Free Exercise Clause prevents government from "impos[ing] special disabilities on the basis of ... religious status." *Employment Div., Dep't. of Human Resources v. Smith*, 494 U.S. 872, 877 (1990). This

Court has consistently invalidated exclusions based on religious status or identity. *McDaniel v. Paty*, 435 U.S. 618 (1978), for instance, invalidated a Tennessee statute that barred ministers of the Gospel and priests from serving as delegates to the state's constitutional convention. Tennessee justified the exclusion the same as Missouri does here as ensuring the "separation of church and state." *Id.* at 622. In *McDaniel*, members of this Court agreed that the exclusion of clergy was unconstitutional religious status discrimination. The plurality opinion, for example, reasoned that "[t]he Tennessee disqualification operates against McDaniel because of his *status* as a 'minister' or 'priest.'" *Id.* at 627. And Justices Brennan and Marshall agreed that "the provision ... establishes a religious classification—involvement in protected religious activity—governing the eligibility for office, which I believe is absolutely prohibited." *Id.* at 631-32. (Brennan, J., concurring).

The law at issue in *McDaniel* interfered with free exercise because it conditioned a generally available public benefit, eligibility for office, on the forswearing of certain religious status. *Id.* at 633. Justice Brennan concluded that such an "exclusion manifest[ed] patent hostility toward, not neutrality respecting, religion." *Id.* at 636. He explained that "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits." *Id.* at 639. Justice Stewart agreed because he reasoned that "Tennessee ... penalized an individual for his religious status—for what he is and believes in—rather than for any

particular act generally deemed harmful to society." *Id.* at 643 n.*.

Tennessee closed the door of public service to McDaniel solely based on who he was and what he believed. He was barred from full participation in the political life of the community because of his religious identity. Missouri does the same thing here by excluding Trinity Lutheran from the Scrap Tire Program, even though its application ranked fifth on the merits out of forty-four submitted, simply because it is a church.

Similarly, in *Torcaso v. Watkins*, 367 U.S. 488 (1961), this Court invalidated a state requirement that a notary public must profess a belief in the existence of God to hold office. Such a requirement "set[] up a religious test which ... bar[red] every person who refuses to declare a belief in God from holding a public 'office of profit or trust' in Maryland." *Id.* at 489-90. This Court explained that: "The power and authority of the State of Maryland thus is put on the side of one particular sort of believers—those who are willing to say they believe in 'the existence of God.'" *Id.* at 490. The requirement to profess a belief in God was discrimination based on religious status: those who believed in the existence of God could hold office while those who did not were prohibited. This Court invalidated this religious classification as an unconstitutional invasion of Torcaso's "freedom of

belief and religion." *Id.* at 496.[1]

More recently, this Court explained that *McDaniel* and *Torcaso* stand for the proposition that "[t]he government may not ... impose special disabilities on the basis of religious views or religious status." *Smith*, 494 U.S. at 877. It has thus been clear for decades that "a law targeting religious beliefs as such is never permissible." *Lukumi*, 508 U.S. at 533 (citing *McDaniel*).

The DNR imposes a special disability on religious status by categorically excluding religious organizations from a program intended to provide recycled rubber playground flooring that protects children as they play. Just as states did in *McDaniel* and *Torcaso*, the DNR here excludes Trinity Lutheran solely because of who it is. This kind of status-based discrimination is particularly odious because it disadvantages an entire group of citizens based solely on their identity regardless of the merits, thereby penalizing their religious faith. Here, the DNR closes the door to all religious daycares even if their inclusion would not threaten any legitimate state antiestablishment interest and instead would further the purely secular objectives of the program. This highlights the discrimination and lack of neutrality perpetrated in this case.

The prohibition against religious status discrimination is a constant theme found

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[1] Justices Brennan, Marshall, and Stewart concurred in the judgment in *McDaniel* based on their belief that *Torcaso* controlled. *See* 435 U.S. at 632, 642.

throughout this Court's precedent. Justice O'Connor summed up that principle by noting that "the Religion Clauses—the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, Art. VI, cl. 3, and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring).

At other points, the Court has described its precedent as following a general guiding principle of neutrality toward religion that does not allow for discrimination against or classification based on religious status. In *Grumet*, 512 U.S. at 698 (plurality opinion), this Court explained that "religious people (or groups of religious people) cannot be denied the opportunity to exercise the rights of citizens simply because of their religious affiliations or commitments, for such a disability would violate the right to religious free exercise." *See also id. at* 696 ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion...."); *Lukumi*, 508 U.S. at 542 ("The Free Exercise Clause 'protect[s] religious observers against unequal treatment.'") (quoting *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring)); *Sherbert v. Verner*, 374 U.S. 396, 409 (1963) (noting that the holding in that case reflected the "governmental obligation of neutrality in the face of religious differences."); *Sch.*

*Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 226 (1963) ("In the relationship between man and religion, the State is firmly committed to a position of neutrality"); *see also Walz v. Tax Comm'n.*, 397 U.S. 664, 669 (1970) (describing the Religion Clauses as pursuing a governmental course of "benevolent neutrality" toward religion); *Marsh v. Chambers*, 463 U.S. 783, 802 (1983) ("The First Amendment mandates governmental neutrality between religion and nonreligion."); *accord* Laycock, *Theology, Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 210 (2003) ("[F]irst and foremost, *Smith-Lukumi* is about objectively unequal treatment of religious and analogous secular activities."). The Court has consequently rejected all government attempts "to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 248 (1990) (quoting *McDaniel*, 435 U.S. at 641 (Brennan, J., concurring)).

The DNR's religious status discrimination here conjures up all the evils this Court has condemned and invalidated in the past. It not only imposes special disabilities on the basis of religious status, *see Smith*, 494 U.S. at 877, but also unconstitutionally conditions participation in the life of the community on giving up a religious practice, *see McDaniel*, 435 U.S. at 626. Practically speaking, it requires religious adherents to choose between their religious beliefs and receiving a

generally available public benefit. *See Hobbie*, 480 U.S. at 136 ("Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, *or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs*, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.") (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717-18 (1981)) (emphasis added); *accord Sherbert*, 374 U.S. at 398. The DNR, quite simply, "imposes ... religious tests on [Missouri's] citizens, sorts ... them by faith, and permits ... exclusion based on belief." *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1845 (2014) (Kagan, J. dissenting).

This Court has been quick to invalidate measures that engage in status-based discrimination not just under the Free Exercise Clause but also in other constitutional contexts. *See Lukumi*, 508 U.S. at 543 (collecting parallel First Amendment cases); *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2230 (2015) (questioning the validity of "[s]peech restrictions based on the identity of the speaker"); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 350 (2010) ("[T]he First Amendment generally prohibits the suppression of political speech based on the speaker's identity."); *Zelman v. Simmons-Harris*, 536 U.S. 639, 654 n.3 (2002) (describing programs that differentiate "based on the religious status of beneficiaries" as violating "the touchstone of

r.eutrality under the Establishment Clause"); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) ("The Equal Protection Clause of the Fourteenth Amendment commands ... that all persons similarly situated should be treated alike."); *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) ("Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category").

Indeed, this Court's free speech caselaw regarding public fora is particularly analogous. In *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), for example, this Court invalidated the university's exclusion of a religious student group from a student activity fee program. The only reason the university prohibited the student group from receiving funding was because of its religious viewpoint. *Id.* at 830. But this Court held that exclusions from a neutral public forum based on the religious viewpoint of the speaker violate the Free Speech Clause. *Id.* at 837; *see also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (2001) (requiring school to allow religious groups access to school facilities on equal terms with other groups); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993) (requiring use of school facilities on neutral basis as to a religious group). This equal access principle in the free speech arena correlates to the neutrality principle under the Free Exercise Clause.

Justice Kennedy expressed the overarching

principle at stake in this case just two terms ago by recognizing that "[f]ree exercise ... means... the right to ... establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring). It is simply impossible to establish Trinity Lutheran's religious identity when, as Missouri has done here, the state excludes it from participation in the life of the community solely based on its religious status.

Four members of this Court recently underscored the importance of the government maintaining religious neutrality. They explained that "[a] Christian, a Jew, a Muslim (and so forth)—each stands in the same relationship with her country, with her state and local communities, and with every level and body of government. So that when each person ... seeks the benefits of citizenship, she does so not as an adherent to one or another religion, but simply as an American." *Town of Greece*, 134 S. Ct. at 1841 (Kagan, J., dissenting). But the DNR did not consider Trinity's application to receive a neutral benefit of citizenship on an evenhanded basis. It rejected Trinity's application outright—despite that request's undeniable secular merits—because of the daycare's religious identity.

Such religious status discrimination eschews a course of neutrality in favor of rank hostility to religion. In this case, that hostility is even more pronounced because, as discussed *infra* in Part III, the Scrap Tire Grant Program does not implicate

any valid state establishment concern.

### B. The DNR's categorical exclusion of religious organizations is not neutral or generally applicable.

This Court's *Smith* decision provides space for neutral, generally applicable restrictions under the Free Exercise Clause, but discrimination based on religious status is not neutral in any sense of the word. Nor is such an exclusion generally applicable since it only excludes religious actors. A law that is either not neutral or not generally applicable must satisfy strict scrutiny. *See Lukumi*, 508 U.S. at 531. "Neutrality and general applicability are interrelated, and ... failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Id.* That is the case here.

Indeed, this case is akin to *Lukumi* where this Court struck down the City of Hialeah's ordinances on animal killing because they were not religiously neutral. The ordinances specifically targeted the Santeria religion's practice of animal sacrifice but left virtually all other animal killing unregulated. *See Lukumi*, 508 U.S. at 536 ("The net result of the gerrymander is that few if any killings of animals are prohibited other than Santeria sacrifice ...."). After discussing the law's real operation, this Court concluded that the Hialeah ordinances were not neutral because it "in a selective manner impose[d] burdens only on conduct motivated by religious belief" and thus violated the "rights guaranteed by the Free Exercise Clause." *Lukumi*, 508 U.S. at 543.

There is no such pretense or gerrymander here. In fact, the Court does not have to look beyond the DNR's letter denying Trinity Lutheran's application to participate in the Scrap Tire Grant Program, regardless of its high score on the merits, to decide that the program is not being administered in a neutral manner. Quite to the contrary, the DNR applied an express categorical exclusion based solely on Trinity Lutheran's religious status.

Nor is the DNR's exclusion generally applicable. It applies only to religious institutions. Every secular daycare and other eligible nonprofit organization can participate in the program. A bar *only* against religious entities is a far cry from the "across-the-board criminal prohibition" in *Smith*, 494 U.S. at 884. The DNR's exclusion applies only to daycares and preschools owned and operated by a religious entity. It has no application to daycares motivated by any other philosophy, despite the fact that their programs may be functionally identical to those operated by a church.

In short, there is no plausible argument that the DNR's exclusion of Trinity Lutheran is neutral or generally applicable. Removing the barrier to the church's equal participation in the political community will not result in a constitutional anomaly like the one this Court rejected in *Smith*, where removing a general criminal prohibition on drug use would have granted believers preferential treatment. *See Smith*, 494 U.S. at 886. It will simply reestablish the constitutional norm of equal treatment that the Free Exercise Clause guarantees

to all citizens. *See id.*

## II. The DNR's religious exclusion from the Scrap Tire Grant Program employs a suspect classification that violates the Equal Protection Clause.

Categorically excluding religious institutions from the Scrap Tire Grant Program violates the Equal Protection Clause because it employs a suspect classification that cannot satisfy strict scrutiny.

The DNR undeniably classifies applicants to the Scrap Tire Grant Program by religion. In fact, it explicitly rejected Trinity Lutheran's grant application solely because it is a "church." Pet. App. 152a-153a. There is thus no question that DNR applies Article 1, § 7, of the Missouri Constitution to categorically exclude all "church[es], sect[s] or denomination[s] of religion" from the Scrap Tire Grant Program, Pet. App. 152a-153a, a religious classification that is inherently suspect. *See, e.g.*, *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (noting that a law or regulation triggers strict scrutiny under the Equal Protection Clause if it "is drawn upon inherently suspect distinctions such as ... religion").

Moreover, Trinity Lutheran is undoubtedly similarly-situated to other recipients of scrap tire grants. The DNR scored Trinity Lutheran's application fifth out of forty-four applications submitted in 2012 and would have granted the

application but for the fact that Trinity Lutheran is a church. *See* Pet. App. 152a-154a. Because the DNR was poised to give Trinity a grant absent its religious identity, there is no question that the church is similarly-situated to other applicants who the DNR allowed to participate in the Scrap Tire Grant Program on a neutral basis. In fact, on the merits, the DNR scored Trinity Lutheran's application higher than thirty-nine other would-be grant recipients. Yet it turned Trinity Lutheran away based solely on its religious status.

This flies in the face of the Equal Protection Clause's "direction that all persons similarly situated should be treated alike." *Cleburne,* 473 U.S. at 439. Yet the DNR treats religious organizations differently on the basis of an inherently suspect classification—religion. When the government treats similarly situated entities differently solely because of their religious status, it must satisfy the rigors of strict scrutiny. *See Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 651 (1992) (recognizing that laws that "classify along suspect lines like ... religion" are subject to strict scrutiny).

Indeed, this Court generally treats religious classifications as "presumptively invidious." *Plyler v. Doe*, 457 U.S. 202, 216 (1982). This is so because "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as *individuals*, not as simply components of a racial, religious, sexual or national class." *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) (internal

marks omitted), *overruled by Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

This Court's decision in *Locke* is not to the contrary. The Eighth Circuit cited *Locke v. Davey* for the proposition that "in the absence of a valid Free Exercise claim, Trinity['s] Equal Protection Claim is governed by rational basis review" and held that "[t]he high wall of separation between church and state created by Article I, § 7," satisfies that low threshold. Pet. App. 12a; *see also Locke*, 540 U.S. at 720 n.3 ("Because we hold ... that the program is not a violation of the Free Exercise Clause, however, we apply rational-basis scrutiny to [Davey's] equal protection claims. For the reasons stated herein, the program passes such review.") (internal citations omitted).

But *Locke* did not lay down a rule that any time equal protection and free exercise claims arise out of the same set of facts, the strength of the former is always coequal with the latter. To the contrary, *Locke's* brief discussion of equal protection was limited to a few sentences in a footnote and applies only to one type of equal protection claim—those based on interference with a fundamental right. And it is completely unsurprising that the *Locke* Court would judge a fundamental-right claim under rational basis scrutiny after concluding the law did not violate the fundamental right in question.

Importantly, *Locke* cited two cases in support of its holding that because Davey did not establish a free exercise violation, his equal protection claim

was subject to only rational basis review. The first case was *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974). Robison brought a two-pronged challenge under the Equal Protection Clause. He contended that denying educational benefits to conscientious objectors interfered with his fundamental right to the free exercise of religion. *Id.* Robison also argued that conscientious objectors were a suspect class that subjected the classification to strict scrutiny. *Id.* In regard to this fundamental rights claim, the Court stated:

> Unquestionably, the free exercise of religion is a fundamental constitutional right. However, since we hold in Part III, *infra*, that the Act does not violate appellee's right of free exercise of religion, we have no occasion to apply to the challenged classification a standard of scrutiny stricter than the traditional rational-basis test.

*Id.*

The Court also rejected Robison's suspect classification claim because conscientious objectors do not constitute a suspect class that triggers strict scrutiny. *Id.* *Robison* thus merely stands for the "obvious principle that if state action does not trigger strict scrutiny under the Free Exercise Clause, it will not trigger strict scrutiny under the fundamental right prong of the Equal Protection Clause, either—but the opinion says nothing at all with regard to a challenge under the suspect classification prong." Susan Gellman, Susan Looper-Friedman, *Thou Shalt Use the Equal*

*Protection Clause for Religion Cases (Not Just the Establishment Clause)*, 10 U. PA. J. CONST. L. 665, 733-36 (2008). Certainly, *Robison* did not hold that laws employing a suspect classification or actually implicating a fundamental right are subject only to rational basis review.

The *Locke* Court also cited *McDaniel v. Paty* for its equal protection holding. But the *McDaniel* plurality opinion said nothing about religion as a suspect class and never evaluated McDaniel's equal protection claim. The sole reference to equal protection in *McDaniel* appears in Justice White's concurrence. 435 U.S. at 643-46. Justice White evaluated that case under the Equal Protection Clause because he believed that seeking elective office was an important right that should subject the statute to careful scrutiny. *Id.* at 644. But his concurring opinion did not address an equal protection claim based on a suspect classification.

Simply put, this Court has never held that a religious suspect classification claim under the Equal Protection Clause rises or falls based on the success of a companion free exercise claim. Instead, this Court has consistently held that suspect classifications based on religious status are "inconsistent with elemental constitutional premises. Thus we have treated as presumptively invidious those classifications that disadvantage a 'suspect class'....." *Plyler*, 457 U.S. at 216.

The religious difference between Trinity Lutheran's daycare and secular daycare operators is the *only* basis for the exclusion here, although they

both seek scrap tire funds to fulfill the state's recycling goals and to provide children a safer area to play. Because the DNR employs a suspect classification, it must satisfy strict scrutiny.

## III. The DNR's categorical exclusion cannot withstand the rigors of strict scrutiny.

Under the Free Exercise Clause, the government must show that a law which is either not neutral or generally applicable is justified by a compelling governmental interest and is narrowly tailored to advance that interest. *See Lukumi*, 508 U.S. at 531-32; *see also Smith*, 494 U.S. at 886 n.3 ("Just as we subject to the most exacting scrutiny laws that make classifications based on race, or on the content of speech, so too we strictly scrutinize governmental classifications based on religion"). Likewise, a suspect classification under the Equal Protection Clause must satisfy strict scrutiny. *See Dukes*, 427 U.S. at 303 (holding that a law or regulation triggers strict scrutiny under the Equal Protection Clause if it "is drawn upon inherently suspect distinctions such as ... religion"). The DNR's religious exclusion here fails both prongs of the strict scrutiny analysis, which together comprise "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

### A. The DNR has no compelling interest in categorically excluding religious institutions from the Scrap Tire Grant Program.

The DNR asserts that it has a heightened interest in the separation of church and state that is memorialized in Article 1, § 7. The Eighth Circuit also cited this interest as the justification for Trinity Lutheran's categorical exclusion from the Scrap Tire Grant Program even though the secular merits of its application ranked near the top. *See* Pet. App. 5a (citing *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376, 383-84 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974) (noting Missouri's "long history of maintaining a very high wall between church and state")).

But this Court has already rejected the DNR's asserted categorical compelling interest. In *Widmar v. Vincent*, 454 U.S. 263, 278 (1981), the University of Missouri at Kansas City opened its facilities for the activities of registered student groups but excluded one religious student group who wanted to use the facilities for "religious worship and religious discussion." *Id.* at 265. This Court invalidated the state's religious exclusion under the Free Speech Clause, holding that the university had created an open forum for student groups and its "exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the university is unable to justify this violation under applicable constitutional standards." *Id.* at 277.

In *Widmar*, the university, like the DNR here, attempted to justify its exclusion of a religious group by arguing that it was avoiding a federal Establishment Clause violation and also that it was attempting to achieve the greater degree of separation of church and state required by the Missouri Constitution, including the provision the DNR cites here—Article I, § 7. This Court rejected both arguments. It first noted, under the federal Establishment Clause, that an open forum policy "including nondiscrimination against religious speech" had a secular purpose and avoided entanglement with religion. *Id.* at 271-72.

The *Widmar* Court then rejected the argument that opening the speech forum to the religious student group would have the primary effect of advancing religion. *Id.* at 272. It noted that the forum was available to "a broad class of nonreligious as well as religious speakers" and that the "provision of benefits to so broad a spectrum of groups is an important index of secular effect." *Id.* at 274. "If the Establishment Clause barred the extension of general benefits to religious groups," this Court explained that "'a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.'" *Id.* at 274-75 (quoting *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 747 (1976) (plurality opinion)).

Just as importantly, the *Widmar* Court rejected the university's antiestablishment interest under Article I, § 7, of the Missouri Constitution—the exact same provision at issue in this case. It explained

that "the state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause." *Id.* at 276. Hence, this Court has already determined that Missouri cannot further its state constitutional antiestablishment interest by violating the free exercise rights of its citizens. The DNR's attempt to invoke the Missouri state constitution to justify violating Trinity Lutheran's First Amendment rights must therefore fail.

Like the University in *Widmar*, which tried to exclude a religious group from an open forum accessible to all, the DNR attempts to exclude Trinity Lutheran from a neutral and generally available public benefit program. But, as this Court concluded in *Widmar*, including religious citizens in a neutral benefit program equally available to all does not compromise any antiestablishment principle and cannot constitute a government interest "of the highest order." *Thomas*, 450 U.S. at 718 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)).

In short, there cannot be a compelling interest in the "separation of church and state" if there is no possibility of a breach by treating religious citizens the same as everyone else. Where (1) the criteria for inclusion in the Scrap Tire Grant Program is entirely secular, (2) the factors used to select grant recipients are wholly secular and, perhaps most importantly, (3) the aid itself—rubber playground surfacing material—is devoid of any religious

content and (4) cannot possibly be diverted to a religious use, that is plainly true. It is certainly difficult to imagine a more secular program than using recycled tire material to prevent children from getting hurt as they run, climb, and swing on the monkey bars.

Moreover, it is not rational to categorically exclude churches from neutral and otherwise generally available public benefit programs when their objectives and practical impact are entirely secular. Police and fire departments, for instance, protect churches as well as secular businesses to promote public safety and the general welfare. Cities build and repair streets and sidewalks in front of churches and secular organizations alike to facilitate transportation, commerce, and community. Even though churches are undeniably "aided" to some degree by these government programs, these benefits have nothing to do with religion and "aid" all citizens equally no matter what philosophy (secular or religious) animates their lives.

It is simply irrational for the DNR to exclude religion in the name of achieving a pinnacle degree of church-state separation in these circumstances. All the DNR is really accomplishing by excluding religious institutions from a neutral benefit program available to all is treating religious entities worse than everyone else. The DNR's exclusion thus represents "a brooding and pervasive devotion to the secular and ... [an] active hostility to the religious," which is "prohibited by [the Constitution]." *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring)

(internal marks omitted); *see also Rosenberger*, 515 U.S. at 846 (cautioning against "fostering a pervasive bias or hostility to religion"). The DNR simply has no legitimate, let alone compelling, interest in excluding all religious organizations from participating in the Scrap Tire Grant Program.

### B. Any legitimate interest the DNR may have is not advanced by the least restrictive means available.

The DNR certainly cannot prove that a categorical exclusion of religion advances any legitimate interest it may possess in the least restrictive manner available. If the government's interest can be "achieved by narrower [laws] that burden[] religion to a far lesser degree," *Lukumi*, 508 U.S. at 546, then a law is not narrowly tailored. Laws that, for instance, sweep too much protected conduct into their prohibitory reach are not narrowly tailored.

In *Lukumi*, this Court found the ordinances at issue not to be narrowly tailored because they were overbroad. *See id.* at 546 (holding that the city's interests "could be achieved by narrower ordinances that burdened religion to a far lesser degree"). The City, for example, raised a legitimate governmental interest in preventing improper disposal of animals that had been killed. But this Court noted that "[i]f improper disposal, not the sacrifice itself, is the harm to be prevented, the city could have imposed a general regulation on the disposal of organic garbage." *Id.* at 538.

Similarly, in *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105 (1991), this Court held that the "Son of Sam" statute was not narrowly tailored in light of the state's asserted interest in compensating crime victims because it applied to a "wide range of literature that does not enable a criminal to profit from his crime while a victim remains uncompensated." *Id.* at 122-23; *see also First Nat. Bank v. Bellotti*, 435 U.S. 765, 794-95 (1978) (holding that a statute prohibiting corporations from making contributions or expenditures to influence the vote on referendum proposals was not narrowly tailored to advance the asserted interest in protecting shareholders because it prohibited contributions or expenditures made even with the unanimous consent of shareholders).

The overinclusiveness of the DNR's exclusion is apparent because it extends to all religious organizations regardless of any conceivable impact on the state's asserted interest. Indeed, such a blanket restriction bears no connection to any imaginable interest other than denying the religious access to programs designed to further basic public safety. Given that the Scrap Tire Grant program (absent the religious exclusion) is entirely neutral and that Trinity Lutheran's participation in that program would serve the State's recycling and safety goals equally well, the DNR simply has no legitimate basis for excluding the church.

Yet the DNR wields an axe when a scalpel would

suffice. This is not a case in which the state allows money to flow to recipients to use as they wish with minimal oversight or restrictions. The DNR, for instance, utilizes strict record-keeping and reporting requirements. *See* Pet. App. 92a-96a. Grant payments are only *reimbursements* for payments already made by the recipient and they do not cover the total cost of the project. *Id.* at 94a; *see also* Addendum at 5a-6a. And the DNR specifies that "[g]rant recipients will be reimbursed only after the playground scrap tire surface material is installed and verified by a department inspector and all required documentation is submitted and approved by the department project manager." Addendum at 5a. Furthermore, the DNR has strict accountability requirements for grant funds. Pet. App. 95a-96a. The DNR thus knows full well how to ensure the fulfillment of its programmatic goals while preserving any antiestablishment interest it may have in providing generally available public benefits to religious organizations. A categorical ban on religion is merely an overbroad and unconstitutional restriction on the ability of the faithful to participate on equal terms in public life.

The DNR's categorical exclusion of churches violates the Free Exercise and Equal Protection Clauses because it is status based discrimination that does not serve a compelling interest by the least restrictive means available to the State. Accordingly, this Court should reverse the judgment of the Eighth Circuit.

## IV. *Locke v. Davey* does not sanction religious status discrimination.

This Court's decision in *Locke v. Davey* does not establish that states can engage in religious status discrimination as they please. In *Locke*, this Court held that the State of Washington did not violate the Free Exercise Clause when it denied scholarship funds for students pursuing a degree in devotional theology. 540 U.S. at 715. The Court held that excluding "training for religious professions" fell within the "play in the joints" between state actions "permitted by the Establishment Clause but not required by the Free Exercise Clause" based on unique historical concerns related to "procuring taxpayer funds to support church leaders." *Id.* at 718-19, 721-22.

This Court's decision in *Widmar*, however, establishes the general rule that antiestablishment interests under a state constitution cannot violate the rights guaranteed by the United States Constitution. 454 U.S. at 276. The *Locke* decision must therefore be read in concert with *Widmar*. If anything, *Locke* is a narrow exception to *Widmar's* general rule based on a unique historical concern—state funding for the religious training of clergy—that has no application in a case like this that deals with installing rubber playground flooring to protect children as they play. In *Locke*, this Court was concerned by *what* the scholarship funds were going to be used for—the devotional training of clergy—not the identity of those *who* were using the money. But Trinity Lutheran's religious identity was the sole

basis for the DNR's exclusion here. *Locke* simply has no application in that context.

### A. Trinity Lutheran does not seek funding for an essentially religious endeavor.

The cardinal fact in *Locke* was that Davey was seeking funding for an "essentially religious endeavor," the devotional training of clergy. *Id.* at 721. The Court could "think of few areas in which a state's antiestablishment interests come more into play" because "procuring taxpayer funds to support church leaders ... was one of the hallmarks of an 'established' religion." *Id.* at 722. The unique historical concerns related to funding the devotional training of clergy formed the backbone of the *Locke* decision.

Critically, the *Locke* Court explicitly warned that "the only interest at issue" in that case was "the State's interest in not funding the religious training of clergy. Nothing in [the Court's] opinion suggests that the State may justify any interest that its 'philosophical preference' commands." *Id.* at 722 n.5. *Locke*, "[a]s written, [thus] applies only to funding the training of clergy" and nothing more. Douglas Laycock, *Theology, Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. at 161-62.

In this case, Trinity Lutheran does not seek funding for an essentially religious endeavor. It

merely wishes to participate in a generally available reimbursement program to obtain recycled scrap tires that are transformed into a pour-in-place rubber playground surface that protects children's physical safety. The surface that children play on as they enjoy recess is about as far as one can get from the devotional training of clergy.

Indeed, the Scrap Tire Program is entirely secular from top to bottom. The criteria used to judge grant applications are completely secular. *See* Addendum 9a-19a. Scrap tire material is not, and cannot be, transformed into anything remotely religious, but instead is used in a neutral way to cushion children as they play. As Judge Greunder noted below in this case: "[S]choolchildren playing on a safer rubber surface made from environmentally friendly recycled tires has nothing to do with religion." Pet. App. 29a. The *Locke* Court's concern regarding the devotional training of clergy simply has no place here.

Regardless, the Eighth Circuit attempted to fit a square peg in a round hole by characterizing Trinity's Complaint as "seek[ing] to compel the direct grant of public funds to churches [which is] another of the 'hallmarks of an 'established' religion.'" Pet. App. 10a (citing *Locke*, 540 U.S. at 722). Yet this Court has never set forth such a simplistic rule that any and all generally available public benefits that flow to a church create an antiestablishment problem. Obviously, providing police, fire, and rescue service to churches on equal terms with other buildings is no "hallmark" of an

established religion. *Locke*, 540 U.S. at 722. And it matters not if the service is provided through local subsidization; for example, through the waiver of ambulance bills as occurs in nearby Fairfax County, Virginia. *See* Fairfax County Fire and Rescue Department Emergency Ambulance Service Billing, *available at* www.fairfaxcounty.gov/fr/ems_billing/ems_transport_flyer-largeprint.pdf (subsidizing 911 ambulance services for county residents) (last visited April 11, 2016). The selective denial of such services, or assessing special charges based on religious identity, would be rank discrimination.

Instead, programs, like the one in this case, that evenhandedly allocate a secular benefit for secular use to a broad class of recipients generally do not implicate a religious establishment even if they flow directly to a religious institution. In *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646, 656–59 (1980), for instance, this Court upheld a program in which aid flowed directly to a religious school because "there d[id] not appear to be any reason why payments to sectarian schools to cover the cost of specified activities would have the impermissible effect of advancing religion if the same activities performed by sectarian school personnel without reimbursement but with state-furnished materials have no such effect." *See also Roemer*, 426 U.S. at 736 (upholding direct grants to religious institutions because of prohibition against using the grant for sectarian purposes); *Hunt v. McNair*, 413 U.S. 734, 736, 744-45 (1973) (upholding issuance of revenue bonds for benefit of religious college where there was a prohibition on use of funds

for buildings or facilities used for religious purposes).

In fact, a contrary rule would mean, for example, that a government could waive express toll lane charges for high occupancy vehicles (HOV), yet exclude church buses. *See, e.g.* Toll-free travel on the 95/495 Express Lanes, https://www.ezpassva .com/EZPages/New-Flex.aspx (describing a Virginia program that allows for toll charges to be waived for high occupancy vehicles) (last visited April 11, 2016). But religious organizations should not be discriminated against solely because of their religious identity when they participate in neutral and generally available public benefits that apply equally to everyone.

Recycled scrap tire material is not amenable in any way to religious purposes. It is wholly secular. There is no way for Trinity Lutheran to convert rubber protecting children from injury into the advancement of religious doctrines. As the plurality noted in *Mitchell v. Helms*, 530 U.S. 793, 824 (2000), "[t]he risk of [an Establishment Clause violation] is *less* when the aid *lacks* content, for there is no risk (as there is with books) of the government inadvertently providing improper content." Scrap tire material has no content and is a far cry from even the aid for instructional materials approved in *Mitchell*, or the provision of government-paid teachers to religious schools upheld in *Agostini v. Felton*, 521 U.S. 203, 230-31, 234-35 (1997).

In short, there are simply no legitimate antiestablishment concerns that could place this

case within *Locke's* bounds. Both the Eighth Circuit and the DNR agree that providing a scrap tire grant to Trinity Lutheran would not violate the federal Establishment Clause. *See* Pet. App. 9a ("[I]t now seems rather clear that Missouri could include the Learning Center's playground in a non-discriminatory Scrap Tire grant program without violating the Establishment Clause."); Dist. Ct. Tr. of Sept. 19, 2013, at 6-7 (argument of DNR's attorney conceding that giving a scrap tire grant to a religious institution would not violate the Establishment Clause). And this case involves no inherently religious activity. Yet both lower courts dismissed Trinity Lutheran's free exercise and equal protection claims because they wrongly concluded that *Locke* controlled based on the fact that aid would flow directly to a church.

But the direct flow of aid to a religious entity was not the issue in *Locke*, which addressed only state funding of "a degree in devotional theology," which "[t]rain[s] someone to lead a congregation," "an essentially religious endeavor." 540 U.S. at 719, 721. This Court was simply concerned about *what* the aid was being used for—the devotional training of clergy—not *who* was using the aid and how that aid flowed. The DNR, though, justifies a categorical exclusion from the Scrap Tire Grant Program solely based on *who* obtains the benefit—a church. Such discrimination based on religious identity violates the Free Exercise and Equal Protection Clauses.

### B. The DNR's exclusion exhibits hostility to religion.

This Court noted in *Locke*, 540 U.S. at 720, that the state's disfavor of religion in the scholarship program was "far milder" than the kind of hostility to religion invalidated in *Lukumi*, 508 U.S. at 520. For example, the program in *Locke* did "not deny to ministers the right to participate in the political affairs of the community. And it d[id] not require students to choose between their religious beliefs and receiving a government benefit." *Id.* (internal marks and citations omitted). The *Locke* Court also noted that the scholarship program at issue went "a long way toward including religion in its benefits." *Id.* at 724. Under the State of Washington's program, students could still attend religious schools and could use their scholarship money to fund anything but devotional theology classes. *Id.*

In stark contrast, the DNR categorically excludes religious organizations from receiving reimbursement for a rubber playground surface that merely protects children as they play. This is hostility to religion pure and simple, which inflicts its own unique harm. Like the exclusion in *McDaniel v. Paty*, which this Court cited in *Locke* as an example of unconstitutional discrimination, the DNR's blanket ban denies religious organizations the right to "participate in the [life] ... of the community" on equal terms. *Locke*, 540 U.S. at 720.

Churches like Trinity Lutheran are not constitutional lepers. Yet, the only way The

Learning Center could receive a scrap tire grant would be for Trinity Lutheran to disavow its nature as a church or for the preschool to separate from the church. Hence, the DNR unconstitutionally requires applicants to "choose between their religious beliefs and receiving a government benefit." *Locke*, 540 U.S. at 720-21. This religious exclusion wrongfully sends a message that some children are less worthy of protection simply because they enjoy recreation on a playground owned by a church. This is not a mild disapproval of religion but implicates the physical safety of both students and neighborhood kids. And it renders the faithful consummate outsiders to the political community by denying their right to be treated on equal terms with other nonprofit groups.

Religious organizations and their members pay the scrap tire fee when purchasing new tires just like everyone else, but they are uniquely unable to benefit from the program it funds solely because of their religious status. This exclusion denies religious organizations equal treatment and the right to establish their "religious ... self-definition in the political, civic, and economic life of our larger community" for no rational (let alone compelling) purpose. *See Burwell*, 134 S. Ct. at 2785 (Kennedy, J., concurring).

### C. Missouri's Article 1, § 7, has a "credible connection" to the religious bigotry exhibited by the Blaine Amendment.

The Court in *Locke* noted that the Washington

constitutional provision at issue was not a Blaine Amendment, nor had Davey "established a credible connection" to a Blaine Amendment. *Id.* at 723. n.7. Accordingly, the *Locke* Court did not consider the anti-Catholic bigotry that resulted in other state constitutional provisions. *Id.*

In contrast, Article 1, § 7, of the Missouri Constitution, to which the DNR pointed in denying Trinity Lutheran's application, has a credible connection to the bigotry of the federal Blaine Amendment. It was enacted in 1875—the exact same year the federal Blaine Amendment was proposed and debated. *See* MO. CONST. art 1, § 7, *available at* http://www.moga.mo.gov/MoStatutes/Consthtml/A010071.html (last visited April 7, 2016); *see also* Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 626 n.149 (2003) ("[O]vert anti-Catholic bigotry ... was widespread in late nineteenth century America"). Notably, Article I, § 7, is a strict no aid provision that shares the same grounding in "hostility to the Catholic Church and to Catholics in general" that this Court recognized in *Mitchell*, 530 U.S. at 828 (plurality opinion). And, Article I, § 7's past connection to religious bigotry carries over to the present in the DNR's application of that provision to categorically exclude religious preschools and daycares from the Scrap Tire Program, which constitutes religious status discrimination of the worst kind.

In sum, none of the factors this Court relied

upon in *Locke* are present here. This case is different in all relevant respects. Unlike *Locke*, it involves: (1) a generally available public benefit that is completely secular and that does not involve an inherently religious activity, such as the training of clergy; (2) an unmistakable hostility to religion that is not a mild disfavor of religion; (3) a categorical exclusion of religion that bars religious organizations completely from the program; and (4) a constitutional provision, Article I, § 7, that reflects the bigotry of the Blaine Amendment. *Locke* never sanctioned such a categorical exclusion of religion from an otherwise secular, neutral, and generally available public benefit program that raises no valid antiestablishment concern.

The Court should not allow the DNR to use a state constitutional provision to eviscerate a church daycare's First and Fourteenth Amendment right to participate equally in society without first surrendering its religious character.

## CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the court of appeals and hold that categorically excluding Trinity Lutheran from the Scrap Tire Grant Program based solely on its religious status constitutes a violation of the church's free exercise and equal protection rights.

Respectfully submitted,

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April 14, 2016

# ADDENDUM

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# MISSOURI DEPARTMENT OF NATURAL RESOURCES PUBLICATION 2425

Missouri Department of Natural Resources

## PLAYGROUND SCRAP TIRE SURFACE MATERIAL GRANT APPLICATION INSTRUCTIONS FOR FORM 780-2143

Solid Waste Management Program
fact sheet

12/2014
PUB2425

Division of Environmental Quality
Director: Leanne Tippett Mosby

**This fact sheet contains:**

- Information on who may apply for playground scrap tire surface material grants.
- A description of playground scrap tire surface material grants.
- The amount of available funding.
- Detailed requirements and procedures for applying for a grant.
- Application instructions.
- Evaluation criteria.
- A list of scrap tire material vendors.
- A Solid Waste Management Region map and list of Solid Waste Management District contacts.

**Types of projects eligible for funding upon award under this announcement**
Playground projects only.

**Who may apply for a playground scrap tire surface material grant?**
Public school districts, private schools (depending on status), park districts, nonprofit day care centers, other nonprofit entities and governmental organizations other than state agencies are eligible to submit applications. Privately owned, residential backyard areas, and private in-home day care centers are ineligible.

Assistance is available only for those projects located within the state of Missouri. Applications may come from an individual school within a public school district or individual park within a park district or city/county boundary; however, the department reserves the right to limit the number of grants a school, park district, city/county can receive.

Prior recipients of scrap tire surface material grants are ineligible during this grant cycle unless an expansion to the prior surfaced area is planned or a different location or area will be surfaced. Prior surfaced areas cannot be repaired or upgraded with grant funds.

**Notice to religious based organizations**
Due to a Missouri Supreme Court ruling, religious based organizations may be eligible for a grant if:

1. The applicant is not owned or controlled by a church, sect or denomination of religions and the grant would not directly aid any church, sect or denomination of religion.
2. The applicant's mission and activities are secular (separate from religion; not spiritual) in nature.
3. The grant will be used for secular (separate from religion; not spiritual) purposes rather than for sectarian (denominational, devoted to a sect) purposes.

**Evaluation**

Evaluation criteria are used to score all applications. One of the evaluation criterions is specifically used to assist in equitably distributing available funding within the geographic boundaries of Missouri. Additionally, once all grant applications are evaluated and scored should multiple applications receive the same score the department shall break such tie by assigning each application a number and selecting numbers in a random draw until grant funds are exhausted.

**Note:** The department reserves the right to deny funding to anyone convicted of defrauding the department, has failed to honor a previous contractual agreement or covenant with the department, has substantially failed to meet the minimum performance criteria of a previous project funded by the department due to mismanagement, deception or negligence, or has documented less than satisfactory performance in the administration of a previous department grant.

**Information about eligible playground scrap tire surfacing materials**

The department is accepting applications that promote the use of recycled scrap tires for playground surface materials. All grant recipients will be required to purchase scrap tire material from manufacturers that use at least 40 percent Missouri generated scrap tires in their surface material. A list of known vendors is provided with these instructions (page 3.). Loose material must be 8" deep, wire free, and properly contained. Mats/tiles and pour-in-place material must be placed on asphalt, concrete, or other suitable surfaces. All surface material projects must conform to the manufacturer's specifications and be approved by the department.

**Amount of playground scrap tire surface material funding available**

The department plans to provide a total of approximately $150,000 for grants in this grant cycle. Grant applicants requesting mats/tiles or pour-in-place surface material may request up to $20,000 while those grant applicants requesting loose surface material may request up to $10,000. Preference will be given to applicants requesting mats/tiles or pour-in-place surface material.

**Financial assistance agreement and reimbursement of allowable expenditures**

Playground scrap tire surface material grants are paid on a reimbursement basis. Purchases and expenditures of grant funds cannot occur until a Financial Assistance Agreement (FAA) between the

grant recipient and the department has been signed.

The grant recipient is responsible for making all payments for the project. Reimbursement may then be requested solely for the purchase, vendor installation and delivery of the playground scrap tire surface material. Grant recipients will be reimbursed only after the playground scrap tire surface material is installed and verified by a department inspector and all required documentation is submitted and approved by the department project manager. Failure to comply with project quarterly status reporting requirements will result in a delay or non-reimbursement by the department. The term of all playground scrap tire surface material grants is one year as indicated in the FAA.

Funds for these grants must be appropriated and made available to the department by the Missouri General Assembly. The department then determines the total amount of funds available for grant award during the grant period.

**Submission of application**

The original and two complete copies of the application and supporting documentation must be submitted to be eligible for evaluation. Ensure the person who is listed as the authorized official signs and dates the application document.

Mailed applications must be postmarked by Friday, Feb. 27, 2015. Hand-delivered applications must arrive at the department by 5 p.m. on Friday, Feb. 27, 2015.

| **Mail your application to:** | **Hand-deliver your application to:** |
|---|---|
| Missouri Department of Natural Resources | Missouri Department of Natural Resources |
| Solid Waste Management Program | Solid Waste Management Program |
| P. O. Box 176 | 1730 E. Elm St. (Lower Level) |
| Jefferson City, MO 65102-0176 | Jefferson City, MO 65101-0176 |

Applications will not be accepted via fax or e-mail. Applications and supporting documents received after the deadline indicated above are ineligible for evaluation and funding.

**Playground scrap tire surface material vendors**

The following is a list of vendors known to the department whose scrap tire material uses at least 40% Missouri tires in their product. The department in no way endorses the services of these businesses but provides this list for your information. The businesses are listed in no specific order. The department assumes no liability or responsibility for the quality of scrap tire material. Applicants should require from the manufacturer that the scrap tire material be free of

foreign material such as protruding metal, loose wire, rocks, wood, etc. The department suggests applicants request samples of the scrap tire material and consult with vendors regarding proper depth, containment, support and site preparation. Because manufacturers use different processes and feed stocks, the scrap tire material from each vendor may vary.

**NOTE: If a quote is received from a vendor not on this list it is possible scoring points will be deducted as vendors not provided on this list have not been verified by the department as using at least 40% Missouri tires in their product.**

**MISSOURI VENDORS**

**All Inclusive Rec, LLC**
P.O. Box 72
Farmington, MO 63640
573-701-9787
573-701-9312 fax
air@allinclusiverec.com

**Granuband Macon, LLC**
612 Blees Industrial Dr.
Macon, MO 63552
800-800-5350

**Entire Recycling, Inc.**
13974 US Hwy. 136
Rock Port, MO 64482
660-744-2252
877-209-7345

**International Mulch, Co.**
1 Mulch Lane
Bridgeton, MO 63044
866-936-8524

**S. Bollinger & Associates, LLC**
P.O. Box 856
Hillsboro, MO 63050
636-797-5820
636-797-5881
Sbollingerandassociates.com

**National Playground Compliance Group**
16510 Lancaster Estates
Grover, MO 63040
314-225-7988

**KANSAS VENDOR**

**Rooster Rubber**
1720 Wabash Avenue
Kansas City, MO
64127-2505
816-241-6400
816-241-6404 fax
www.roosterrubber.com

**Champlin Tire Recycling, Inc.**
P.O. Box 445
Concordia, KS 66901
800-295-3345

**OTHER**

**Constructive Playthings**
13201 Arrington Road
Grandview, MO 64030
800-448-2972
816-761-8225 fax

**SofSurfaces, Inc.**
4393 Discovery Line,
P.O. Box 239
Petrolia, Ontario,
Canada
800-263-2363
519-882-2697 fax

**Note:** All estimates, bids and invoices should include a statement by the vendor regarding the percentage of Missouri tires used in their product(s).

**Evaluation Criteria**

**1. Applicant Profile and Checklist.**

| | |
|---|---|
| 15 Points | One original signed and dated application and two complete copies including required supporting documentation (e.g., non-profit documentation, if applicable) and a completed and signed checklist were submitted. |
| 10 Points | One original signed and dated application and two complete copies including supporting documentation with the exception of the non-profit documentation, if applicable, and a completed and signed checklist were submitted. |
| **Ineligible** | The required original signed and dated application and two complete copies including required supporting documentation with the exception of the non-profit documentation and a completed and signed checklist **were not** submitted. |

**2. Location Profile.**

| | |
|---|---|
| 15 Points | This portion of the application is complete. Proof of ownership or the owner's signed, written permission and ownership proof are included in |

| | |
|---|---|
| | the application, along with the exact physical location of the project within the property description provided. |
| 10 Points | Proof of ownership or the owner's signed, written permission and ownership proof are included in the application. However, the exact physical location of the project within the property description provided is not provided or cannot be determined from the application. |
| 5 Points | Proof of ownership or the owner's signed, written permission and ownership proof are included in the application. This portion of the application is somewhat complete, but additional supporting documentation is needed. |
| **Ineligible** | Proof of ownership or the owner's signed, written permission and ownership proof are not included in the application. |

**3. Project Description.**

| | |
|---|---|
| 15 Points | This portion of the application is complete. The proposed project is described adequately to enter into a financial assistance agreement. The application includes the type of material to be used, the dimensions |

| | |
|---|---|
| | and complete description of the area(s) to be surfaced. This portion describes the need for the project, its current status, and the approximate geographic area that will be served by the project. |
| 10 Points | This portion of the application is substantially complete, but a minimal amount of additional information is needed. |
| 5 Points | This portion of the application is somewhat complete, but a significant amount of additional information is needed. |
| 0 Points | This portion of the application is substantially incomplete. |

**4. Material Summary (the project must use at least 40 percent Missouri generated scrap tires to be eligible. (documented by copies of surface material vendor letters, quotes, contracts, purchase orders, etc.). Bids must specify the minimum percentage of Missouri generated scrap tires utilized in their product(s).**

| | |
|---|---|
| 15 Points | Project uses 100 percent scrap tires generated in Missouri (vendor source documentation provided). |
| 5 Points | Project uses more than 40 percent scrap tires generated in Missouri but |

| | |
|---|---|
| | less than 100 percent (vendor source documentation provided). |
| 0 Points | Project uses less than 40 percent scrap tires generated in Missouri or unable to determine or verify percentage of Missouri generated scrap tires used. |
| **Ineligible** | Project does not use scrap tires generated in Missouri or vendor does not provide certification and/or documentation of the percentage of Missouri generated scrap tires utilized in their product. |

**4a. Material Type.**

| | |
|---|---|
| 15 Points | Project uses mats/tiles and/or pour-in-place surface material. |
| 10 Points | Project uses a combination of mats/tiles and/or pour-in-place, along with loose surface material. |
| 5 Points | Project uses loose surface material only. |
| 0 Points | There are concerns about the appropriateness of the surface material used or the applicant does not describe the type of surface material to be used. |

**4b. Material Containment/Support.**

| | |
|---|---|
| 15 Points | The described method of containment for the appropriate depth of loose surface material (8") is adequate or project uses mats/tiles or pour-in-place surface material on concrete, asphalt or other suitable support material. |
| 5 Points | There are concerns about the adequacy of the described containment or surfacing. |
| 0 Points | The applicant does not describe any type of containment of the loose surface material or does not describe the support surface on which the mats/tiles or pour-in-place surface material will be placed. |

**4c. Material Commitment (documented by copies of surface material vendor letters, quotes, contracts, purchase orders, etc.). Bids must specify the minimum percentage of Missouri generated scrap tires utilized in their product(s).**

| | |
|---|---|
| 15 Points | Application includes at least 3 quotes from scrap tire material vendors. |
| 10 Points | Application includes 1 or 2 quotes from scrap tire material vendors. |

| | |
|---|---|
| 5 Points | Application only lists those scrap tire material vendors that will be targeted for the project, but does not provide any quotes from the scrap tire material vendors for the project. |
| 0 Points | Application contains no information about scrap tire material vendors to be used on the project. |

**5. Media Exposure.**

| | |
|---|---|
| 10 Points | Application includes at least 4 types of media/public exposure events/documents (e.g. email, brochures, newspapers, web site, radio). |
| 5 Points | Application includes 1-3 types media/public exposure events/documents (e.g. email, brochures, newspapers, web site, radio). |
| 0 Points | Application includes no media/public exposure events/documents (e.g. email, brochures, newspapers, web site, radio). |

**6. Recycling Education.**

| | |
|---|---|
| 10 Points | This portion of the application is complete (includes solid waste management education that will be |

| | |
|---|---|
| | incorporated into the school's curriculum or into informational material to be provided to the public by the grant applicant). |
| 0 Points | Significant areas of this portion of the application are incomplete. |

**7. Cooperative Efforts with Solid Waste Management Region.**

| | |
|---|---|
| 15 Points | The Solid Waste Management Region has committed to involvement with the project through presentations/event attendance (region documentation provided). |
| 10 Points | The Solid Waste Management Region endorses the project (region documentation provided). |
| 0 Points | No involvement or endorsement from the Solid Waste Management Region. |

**8. Scope of Work/8a. Timeline.**

| | |
|---|---|
| 15 Points | Project tasks, actions needed to complete the tasks and key personnel responsible for tasks, provided. The scope of work and timeline coincide. The project is likely to be implemented in a timely manner. |

| | |
|---|---|
| 5 Points | There are concerns about the project being implemented in a timely manner (portions of scope and timeline coincide). |
| 0 Points | The project is unlikely to be implemented in a timely manner (scope and timeline don't coincide or tasks do not adequately describe completion of the project). |

**9. Budget/9a. Support Documentation.**

| | |
|---|---|
| 15 Points | The budget is complete and supported by 3 or more scrap tire material vendor quotes. |
| 10 Points | This portion of the application is substantially complete, but additional information is needed or less than 3 scrap tire material vendor quotes were provided |
| 0 Points | The budget is not mathematically accurate and/or is missing information. |

**10. Purchase of additional scrap tire surface material/proof of support. This criteria refers to *ADDITIONAL SCRAP TIRE MATERIAL ONLY.***

| | |
|---|---|
| 15 Points | Applicant will purchase an additional amount of scrap tire |

| | |
|---|---|
| | material that is greater than 50 percent of their requested grant amount is supported by documentation and no other project costs but scrap tire material is included. |
| 10 Points | Applicant will purchase an additional amount of scrap tire material that is greater than 25 percent, but less than 50 percent of their requested grant amount is supported by documentation and no other project costs but scrap tire material is included. |
| 5 Points | Applicant will purchase an additional amount of scrap tire material that is greater than 10 percent, but less than 25 percent of their requested grant amount, is supported by documentation and no other project costs but scrap tire material is included. |
| 0 Points | Applicant will purchase an additional amount of scrap tire material that is less than 10 percent of their requested grant amount, no supporting documentation and other project costs or has included other costs associated with the project. |

**11a. School District Percentage of Student Population below the Poverty Level (based on DESE data).**

| | |
|---|---|
| 30 Points | School district's student population poverty percentage is greater than 75%. |
| 15 Points | School district's student population poverty percentage is greater than 50% and up to 75%. |
| 10 Points | School district's student population poverty percentage is greater than 10% and up to 50%. |
| 5 Points | School district's student population poverty percentage is less than 10%. |

**OR**

**11b. Entity's (other than schools) Percentage of Poverty Level (based on Missouri Census Data Center data by county).**

| | |
|---|---|
| 30 Points | Zip code's poverty percentage is 40% or higher. |
| 15 Points | Zip code's poverty percentage is 25% up to 40%. |
| 10 Points | Zip code's poverty percentage is 10% up to 25%. |
| 5 Points | Zip code's poverty percentage is 1% up to 10%. |

| | |
|---|---|
| 0 Points | Zip code's poverty percentage is less than 1%. |

**12. Equitable Distribution of Grant Funds Across Missouri.**

| | |
|---|---|
| 15 Points | This project assists in providing grant funds equitably to an underserved area of the state. |
| 0 Points | This project serves an area of Missouri where another grant was evaluated at a higher score and is being awarded. |

**13. Tie Breaker.** Once all grant applications are evaluated and scored should multiple applications receive the same score the department shall break such tie by assigning each application a number and selecting numbers in a random draw until grant funds are exhausted.

**Nothing in this document may be used to implement any enforcement action or levy any penalty unless promulgated by rule under chapter 536 or authorized by statute.**

**For more information**
Missouri Department of Natural Resources
Solid Waste Protection Program
P.O. Box 176
Jefferson City, MO 65102-0176
800-361-4827 or 573-751-5401
http://dnr.mo.gov/env/swmp